

A **DATUK SERI KHALID ABU BAKAR & ORS**

v.

**N INDRA P NALLATHAMBY & ANOTHER APPEAL**

B COURT OF APPEAL, PUTRAJAYA  
MOHAMAD ARIFF MD YUSOF JCA  
MAH WENG KWAI JCA  
DAVID WONG DAK WAH JCA  
C [CIVIL APPEALS NO: W-01(NCVC)(W)-263-07-2013 &  
W-01(NCVC)(W)-278-07-2013]  
8 AUGUST 2014

D **POLICE:** *Duties of police - Breach of statutory duty - Remand prisoner beaten to death by police officers - Failure to notify whereabouts of deceased to family - Whether deceased denied of constitutional right of access to legal representation - Whether inquest held to investigate deceased's death - Whether police breached duty of care to deceased*

E **TORT:** *Damages - Exemplary damages - Breach of constitutional right by public authority - Remand prisoner beaten to death by police officers - Whether exemplary damages may be awarded - Civil Law Act 1956, s. 8(2) - Whether applicable*

F **TORT:** *Duty of care - Duty owed by police officers to remand prisoners - Remand prisoner beaten to death by police officers - Whether deceased allowed access to legal representation - Whether inquest held to investigate deceased's death - Whether police breached duty of care to deceased - Federal Constitution, art. 5(1) & (2) - Criminal Procedure Code, s. 334*

G **TORT:** *False imprisonment - Arrest - Deceased remanded by Magistrate's order - Whether lawful remand - Deceased abused while in remand - Whether gave rise to cause of action for tort of false imprisonment*

H **TORT:** *Public misfeasance - Elements to be proven - Public officers exercising powers wrongly resulting in injury - Remand prisoner beaten to death by police officers - Whether estate of deceased could claim damages for tort of misfeasance*

I One Kugan a/l Ananthan ('the deceased') was arrested in respect of a theft offence on 14 January 2009 and subsequently remanded by a Magistrate on 15 January 2009 for a period of seven days at the Petaling Jaya Police Station lock-up. The deceased was however detained at the Taipan Police Station and not at the

Petaling Jaya Police Station lock-up as stated in the remand order. On 20 January 2009, the deceased died while he was under remand at the Taipan Police Station. Prior to his death, the family was not aware of his detention as they were not informed by the police. The family only became aware when they were informed of his death on 20 January 2009. The deceased's body showed extensive injuries from beatings he sustained during his detention. Despite that, the first defendant, who was then the Deputy Commissioner of Police and the Chief Police Officer of Selangor, on 21 January 2009 issued a press statement that the deceased collapsed and died after drinking a cup of water. The plaintiff disputed the truth of the first defendant's press statement and alleged that there has been a cover up of the real cause of the deceased's death. One Prof Dr Abdul Karim conducted an autopsy (the first autopsy) and the report stated that there were '22 categories of external wounds' and the cause of death was stated as 'pulmonary edema'. With the first autopsy report, the first defendant issued a press statement that the deceased had died from 'water in the lungs'. The author of the first autopsy report was subsequently found guilty of professional misconduct by the Malaysian Medical Council in the preparation of the first autopsy report and was reprimanded. The contents of the first report turned out to be improper and unreliable. A second autopsy report commissioned by the family of the deceased stated that there were '45 categories of external injuries' on the body of the deceased and a wide range of internal injuries. The cause of death was found to be acute renal failure due to direct or indirect muscle injury. Those muscle injuries were found to have been committed by the second defendant with his assault on the deceased. The second defendant was later convicted and sentenced to three years' imprisonment for causing grievous hurt to the deceased. The plaintiff, mother of the deceased, launched this suit claiming aggravated, exemplary, vindictory and special damages and premised it on the tort of negligence, breach of statutory duties for unlawfully causing the death of the deceased, misfeasance of the public office, assault and battery and false imprisonment. The defendants, however, denied the plaintiff's claim despite the conviction of the second defendant. The plaintiff's claim was sustained by the High Court. The defendants appealed against the decision of the High Court in awarding exemplary damages, damages for public misfeasance and false imprisonment. The second defendant also disputed the extent of his liability.

**A Held (allowing appeal in part with costs)**  
**Per David Wong Dak Wah JCA delivering the judgment of the court:**

- B** (1) The deceased's remand was a consequence of a judicial act, being an order given by a Magistrate. Unless and until this remand was set aside by way of a criminal appeal or revision by the High Court, that remand remained lawful. No such application to the High Court had been made by the plaintiff to declare that the remand was unlawful. The abuses which
- C** the deceased endured could not give rise to a cause of action for false imprisonment. The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here, the person who caused
- D** the detention was a Magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful. The award of RM100,000 for false imprisonment was thus set aside. (paras 21, 22 & 88)
- E** (2) The claim of public misfeasance is a tortious claim. It is a public law tort in that it can only be committed by public officers exercising their powers wrongly resulting in injury to the claimant. As the deceased was the victim of the alleged wrongdoings of the first, second and third defendants who were public officers, any tortious claim by the estate came
- F** under s. 8 of the Civil Law Act 1956 ('CLA'). (paras 30 & 31)
- G** (3) To sustain a claim of public misfeasance, the plaintiff has to prove the following: (a) the act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power; (b) the act committed must be done with malice; (c) that there was proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and (d) that the acts of the defendants had
- H** caused material damage to the deceased. (para 33)
- I** (4) The whereabouts of the deceased were not made known to his family. This caused the deceased to have been denied from seeking legal advice which gave rise to a breach of the deceased's constitutional right of access to legal representation as provided by art. 5(1) and (3) of the Federal Constitution.

- Further, there was no inquest held as permitted by s. 334 of the Criminal Procedure Code when the second autopsy by itself should have warranted a full investigation of the circumstances in which the deceased met his death. The learned judge's findings were based on established evidence and were far from perverse. The judge's findings led to the irrefutable conclusion that the first, second and third defendants had breached their duty of care to the deceased. (paras 43, 56 & 58) A  
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- (5) The wilful disregard to ensure that the truth behind the death of the deceased was made known together with other undisputed evidence was enough to satisfy a case of public misfeasance. There had been a reckless indifference to the illegal act of the second defendant. The evidence proffered by the defendants had not rebutted the evidence. The conduct of the defendants fell far short of the standard operating procedure which must require more disclosure than what had happened in this case. (paras 59) C  
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- (6) Section 8 of the CLA only applies to private torts in so far as the prohibition of awarding exemplary damages. Where there is a breach of a constitutional right by a public authority, s. 8(2) of the CLA does not apply and the courts cannot be barred from awarding exemplary damages. Hence, this was an appropriate case to award exemplary damages. As for the quantum of the exemplary damages, there was no reason to disturb the award granted by the learned judge as it commensurated with the actions of the defendants. (paras 74, 75, 77 & 78) E  
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- (7) The learned judge had stated that there were other police officers involved in the circumstances which led to the death of the deceased. Despite those findings, the learned judge failed to take them into consideration in determining the liability of the second defendant. Further, as for the other facets of public misfeasance, some of those conducts occurred post death of the deceased by which time, the second defendant could not have been responsible. This warranted allowing the second defendant's appeal in part in that he was responsible partly for the death of the deceased. The degree of responsibility was reduced to 45%. (para 80) G  
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A ***Bahasa Malaysia Translation Of Headnotes***

Seorang yang bernama Kugan a/l Ananthan ('si mati') telah ditangkap atas kesalahan mencuri pada 14 Januari 2009 dan berikutan itu, ditahan reman oleh Majistret pada 15 Januari 2009 bagi tempoh tujuh hari di lokap Balai Polis Petaling Jaya. Si mati, walau bagaimanapun, ditahan di Balai Polis Taipan dan bukan di lokap Balai Polis Petaling Jaya seperti yang tercatat dalam perintah reman. Pada 20 Januari 2009, si mati meninggal dunia semasa dia ditahan bawah reman di Balai Polis Taipan. Sebelum kematiannya, keluarganya tidak mengetahui mengenai penahanannya kerana mereka tidak dimaklumkan oleh pihak polis. Keluarga si mati hanya mendapat tahu apabila mereka dimaklumkan mengenai kematiannya pada 20 Januari 2009. Mayat si mati menunjukkan kecederaan-kecederaan parah akibat pukulan-pukulan yang dialaminya ketika penahanannya. Walau bagaimanapun, defendan pertama, yang ketika itu merupakan Timbalan Suruhanjaya Polis dan Ketua Pegawai Polis Selangor, pada 21 Januari 2009 mengeluarkan kenyataan akhbar bahawa si mati rebah dan meninggal dunia selepas minum secawan air. Plaintiff mempertikaikan kebenaran kenyataan akhbar defendan pertama dan mendakwa bahawa terdapat penyembunyian mengenai punca kematian si mati. Seorang yang bernama Prof Dr Abdul Karim menjalankan autopsi ('autopsi pertama') dan laporan tersebut menyatakan bahawa terdapat '22 kategori luka luaran' dan bahawa punca kematian adalah akibat 'pulmonary edema'. Dengan laporan autopsi pertama tersebut, defendan pertama mengeluarkan kenyataan akhbar bahawa si mati telah meninggal dunia akibat 'air dalam paru-paru'. Pembuat laporan autopsi pertama kemudiannya didapati bersalah atas salah laku profesional oleh Majlis Perubatan Malaysia semasa penyediaan laporan autopsi pertama dan telah diberi amaran. Kandungan laporan autopsi pertama kemudiannya didapati tidak teratur dan tidak boleh dipercayai. Laporan autopsi kedua yang dikomisenkan oleh ahli keluarga si mati menyatakan bahawa terdapat '45 kategori kecederaan luaran' pada badan si mati dan pelbagai kecederaan dalaman. Punca kematian didapati akibat kegagalan buah pinggang akut disebabkan kecederaan otot secara langsung atau tidak langsung. Kecederaan-kecederaan otot tersebut didapati dilakukan oleh defendan kedua akibat serangannya terhadap si mati. Defendan kedua kemudiannya disabitkan dan dijatuhkan hukuman penjara tiga tahun kerana menyebabkan kecederaan parah terhadap si mati. Plaintiff, ibu si mati, memulakan

guaman ini menuntut ganti rugi keterlaluan, teladan, setimpal dan khas berlandaskan tort kecuai, kerana secara salah menyebabkan kematian si mati, ketidakpatuhan pada etika profesional jawatan awam, serangan serta penahanan salah. Defendan-defendan, walau bagaimanapun, menafikan tuntutan plaintif walaupun defendan kedua telah disabitkan. Tuntutan plaintif dibenarkan oleh Mahkamah Tinggi. Defendan-defendan merayu terhadap keputusan Mahkamah Tinggi dalam mengawardkan ganti rugi teladan, ganti rugi bagi ketidakpatuhan pada etika profesional awam dan penahanan salah. Defendan kedua juga mempertikaikan tahap liabilitinya.

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**Diputuskan (membenarkan sebahagian rayuan dengan kos)  
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:**

(1) Reman si mati adalah hasil daripada tindakan kehakiman, iaitu perintah yang dikeluarkan oleh seorang Majistret. Melainkan dan sehingga reman ini diketepikan melalui rayuan atau semakan jenayah oleh Mahkamah Tinggi, reman tersebut kekal sah. Tiada permohonan kepada Mahkamah Tinggi dibuat oleh plaintif untuk mengisytiharkan bahawa reman tidak sah. Penderaan-penderaan yang dialami oleh si mati tidak boleh membangkitkan kausa tindakan bagi penahanan salah. Kausa tindakan bagi tort penahanan salah berbangkit apabila seseorang itu telah dipenjarakan tanpa justifikasi sah dan bahawa tindakan tersebut terhadap orang yang menyebabkan pemenjaraan tersebut. Di sini, orang yang menyebabkan penahanan tersebut adalah seorang majistret yang menjalankan kuasa kehakiman beliau dan tindakan kehakiman tersebut tidak diketepikan atau diisytiharkan sebagai tidak sah. Award RM100,000 bagi penahanan diketepikan.

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(2) Dakwaan ketidakpatuhan pada etika profesional adalah tuntutan berunsur tort. Ia adalah tort undang-undang awam yang hanya boleh dilakukan oleh pegawai-pegawai awam dalam menjalankan kuasa mereka dengan salah hingga menyebabkan kecederaan kepada pihak yang menuntut. Oleh kerana si mati adalah mangsa salahlaku yang didakwa dilakukan oleh defendan pertama, kedua dan ketiga yang merupakan pegawai-pegawai awam, sebarang tuntutan berunsur tort oleh Negeri terjumlah di bawah s. 8 Akta Undang-undang Sivil 1956 ('Akta').

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- A (3) Untuk membenarkan tuntutan bagi ketidakpatuhan pada etika profesional, plaintif perlu membuktikan yang berikut:
- B (i) tindakan yang diadu dilakukan oleh seorang pegawai awam yang dikatakan telah melakukannya dalam penjalanan kuasa awamnya; (ii) tindakan tersebut mesti dilakukan dengan niat jahat; (iii) terdapat kedekatan antara si mati dan defendan-defendan hingga membangkitkan hak undang-undang kepada plaintif untuk nyaman; dan (iv) tindakan-tindakan defendan telah menyebabkan kemudaratan material kepada si mati.
- C (4) Tempat di mana si mati berada tidak dimaklumkan kepada keluarganya. Ini menyebabkan si mati dinafikan daripada mendapat nasihat guaman yang membangkitkan pelanggaran hak perlembagaan si mati untuk mendapatkan representasi guaman seperti yang diperuntukkan oleh per. 5(1) dan (3) Perlembagaan Persekutuan. Malahan, tiada inkues yang dijalankan seperti yang dibenarkan oleh s. 334 Kanun Tatacara Jenayah apabila autopsi kedua dengan sendirinya sepatutnya mewajarkan siasatan penuh atas hal-hal keadaan bagaimana si mati bertemu dengan ajalnya. Dapatan hakim adalah berdasarkan keterangan kukuh dan jauh daripada tidak munasabah. Dapatan hakim membawa kepada kesimpulan yang tidak boleh disangkal bahawa defendan pertama, kedua dan ketiga telah melanggar tanggungjawab berhati-hati mereka terhadap si mati.
- F (5) Pengabaian sengaja untuk memastikan bahawa kebenaran di sebalik kematian si mati diberitahu bersama-sama dengan keterangan yang tidak boleh disangkal adalah cukup untuk memenuhi satu kes ketidakpatuhan pada etika profesional.
- G Terdapat sikap acuh tak acuh yang cuai ke atas tindakan salah defendan kedua. Keterangan yang dikemukakan oleh defendan-defendan tidak menyangkal keterangan ini. Tindakan defendan-defendan terjumlah jauh daripada prosedur operasi standard yang memerlukan lebih pendedahan mengenai apa yang berlaku dalam kes ini.
- H (6) Seksyen 8 Akta terpakai kepada tort peribadi sejauh mana melibatkan larangan mengawardkan ganti rugi teladan. Apabila terdapat pelanggaran hak perlembagaan oleh pihak berkuasa awam, s. 8(2) Akta tidak terpakai dan mahkamah-mahkamah adalah tidak terhalang daripada mengawardkan ganti rugi
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teladan. Oleh itu, ini adalah kes yang sesuai untuk mengawardkan ganti rugi teladan. Bagi kuantum ganti rugi teladan, tiada sebab untuk mengganggu award yang diberikan oleh hakim kerana ia sejajar dengan tindakan defendan-defendan.

- (7) Hakim telah menyatakan bahawa terdapat pegawai-pegawai polis terlibat dalam hal-hal keadaan yang membawa kepada kematian si mati. Walaupun adanya dapatan-dapatan tersebut, hakim gagal untuk mempertimbangkan kesemuanya dalam menentukan liabiliti defendan kedua. Selanjutnya, bagi lain-lain segi ketidakpatuhan pada etika profesional, sebilangan tindakan-tindakan tersebut berlaku sebelum kematian yang mana, defendan kedua tidak boleh bertanggungjawab. Ini mewajarkan pembenaran sebahagian sahaja daripada rayuan defendan kedua iaitu bahawa dia separa bertanggungjawab bagi kematian si mati. Tahap kebertanggungan dikurangkan kepada 45%.

**Case(s) referred to:**

*Andrew Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 1 LNS 5 FC (**refd**)

*Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975 HL (**fol**)

*Azman Mahmood & Anor v. S'j Securities Sdn Bhd* [2012] 6 CLJ 573 FC (**refd**)

*Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229 FC (**refd**)

*Hajgato v. London Health Association* [1982] 36 OR (2d) 669 (**refd**)

*Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi* [2013] 4 CLJ 47 CA (**fol**)

*Minister of Home Affairs v. Chu Choon Yong & Anor* [1977] 1 LNS 71 FC (**refd**)

*Odhavji Estate v. Woodhouse* [2003] 3 SCR 263 (**refd**)

*PP v. Tengku Mahmood Iskandar & Anor* [1973] 1 LNS 124 HC (**refd**)

*R (on the application of Middleton) v. West Somerset Coroner* [2004] UKHL 10 (**refd**)

*Regina v. Deputy Government of Parkhurst Prison, Ex-Parte Hague* [1992] 1 AC 58 (**refd**)

*Rajeshkanna Marimuthu v. Abd Wahab Hj Kassim* [2003] 1 LNS 581 HC (**not foll**)

*Rookes v. Barnard* (1964) AC 1129 (**refd**)

*Rosharee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39 HC (**refd**)

*Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299 FC (**refd**)

*Thorben Langvad Linneberg v. Leong Mei Kuan* [2012] SGCA 61 CA (**refd**)

*Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220; [2003] 2 AC 1 (**fol**)

*Watkins v. Home Secretary* [2006] 2 AC 395 (**refd**)

**A Legislation referred to:**

Civil Law Act 1956, ss. 7, 8(2)  
Criminal Procedure Code, s. 334  
Penal Code, s. 330

Law Reform (Miscellaneous Provisions) Act 1934 [UK], ss. 1(1), (2)

**B**

*For the 1st, 3rd, 4th & 5th appellants - Azizan Md Arshad, SFC (Nur Aqilah Ishak, FC with him); AG's Chambers*

*For the 2nd appellant - Ramesh Sivakumar (Raymond Charles with him); M/s Ramesh & Loo*

**C**

*For the respondent - R Sivarasa (Bani Prakash & Shahid Adli Kamarudin with him); M/s Edwin Lim Suren & Soh*

*[Editor's note: For the High Court judgment, please see N Indra Nallathamby v. Datuk Seri Khalid Abu Bakar & Ors [2013] 6 CLJ 272.]*

**D** *Reported by Amutha Suppayah*

**JUDGMENT**

**David Wong Dak Wah JCA:**

**E**

**Introduction**

**[1]** One Kugan a/l Ananthan (deceased) met his death while in the custody of the police on 20 January 2009. The deceased was in custody as a result of a seven-day remand warrant issued by a Magistrate in Petaling Jaya on 14 January 2009.

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**[2]** The mother of the deceased as administratrix of the estate took out this legal action to claim for damages for the deceased's death premised on misfeasance of public office, assault, battery and false imprisonment. The plaintiff's claim was sustained by the High Court in which the learned judge made the following orders:

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| No. | Particulars of damages claimed by the plaintiff | Amount claimed by the plaintiff                      | First, third, fourth and fifth defendant's submissions which were adopted by the second defendant | Award and Decision of this court                     |
|-----|-------------------------------------------------|------------------------------------------------------|---------------------------------------------------------------------------------------------------|------------------------------------------------------|
| 1.  | Loss of Support                                 | RM1,000.00 x 12m x 16yrs (multiplier) = RM192,000.00 | RM300 (based on 1/3 from RM1,000.00) x 12m x 16yrs (multiplier) = RM57,600.00                     | RM1,000.00 x 12m x 16yrs (multiplier) = RM192,000.00 |

|     |                              |              |                                                                                                  |                          |          |
|-----|------------------------------|--------------|--------------------------------------------------------------------------------------------------|--------------------------|----------|
| 2.  | Funeral Expenses             | RM9,702.70   | As agreed<br>RM9,702.70                                                                          | RM9,700.00               | <b>A</b> |
| 3.  | Pain and Suffering           | RM10 Million | The amount should be around<br>RM10,000.00                                                       | RM50,000.00              | <b>B</b> |
| 4.  | Assault and Battery          | RM10 Million | Not entitled                                                                                     | No award                 |          |
| 5.  | False imprisonment           | RM500,000.00 | Not entitled                                                                                     | RM100,000.00             | <b>C</b> |
| 6.  | Misfeasance of Public Office | RM10 Million | Not entitled                                                                                     | RM100,000.00             |          |
| 7.  | Aggravated damages           | RM500,000.00 | Not entitled                                                                                     | No award                 |          |
| 8.  | Exemplary damages            | RM10 Million | Not entitled                                                                                     | RM300,000.00             | <b>D</b> |
| 9.  | Vindictory damages           | RM10 Million | Not entitled                                                                                     | No award                 |          |
| 10. | Special damages              |              | Not proved                                                                                       | No award<br>(not proved) | <b>E</b> |
|     |                              | <b>TOTAL</b> | <b>RM801,700.00</b>                                                                              |                          |          |
| 11. | Costs                        | RM300,000.00 | First, third, fourth and fifth defendants<br>= RM20,000.00,<br>Second defendant<br>= RM30,000.00 | RM50,000.00              | <b>F</b> |
|     |                              |              |                                                                                                  |                          | <b>G</b> |

**[3]** The defendants not happy with the decision of the High Court appeal to this court. We heard the appeal and after due consideration to respective submissions of counsel, we reserved judgment and now give our decision and grounds.

**[4]** There are two appeals before us. One appeal is from the first, third, fourth and fifth defendants who are represented by the Attorney-General Chambers and this is appeal No. 263-07/2013. The second defendant is represented by the firm of Messrs Ramesh & Loo and his appeal is No. 278-07/2013.

- A [5] As these two appeals were heard together and for convenience the respective parties shall be referred as they were referred to the in the High Court.

**Concession By The Defendants**

- B [6] At the start of this appeal the learned Senior Federal Counsel (SFC) informed the court that the first, third, fourth and fifth defendants are not appealing against the award for the loss of support (RM192,000), funeral expenses (RM9,700) and pain and suffering (RM50,000). Hence this appeal concerns the rest of
- C damages awarded by the learned judge, namely exemplary damages, damages for public misfeasance and false imprisonment.

[7] As for the second defendant, learned counsel only disputes the extent of his liability.

- D **Background Facts**

- [8] The deceased was arrested in respect of a theft offence on 14 January 2009 and subsequently remanded by a Magistrate on 15 January 2009 for a period of seven days at the Petaling Jaya police station lockup.
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- [9] The deceased was however detained at the Taipan police station and not at the Petaling Jaya police station lockup as stated in the remand order. On 20 January 2009 the deceased met his death while under remand at the Taipan police station. Prior to his death, the family was not aware of his detention as they were not informed by the police. The family only became aware when they informed of his death on 20 January 2009.
- F

- G [10] It is undisputed that the deceased's body showed extensive injuries from beatings he sustained during his detention. Despite that, the first defendant, who was then the Deputy Commissioner of Police and the Chief Police Officer of Selangor, on 21 January 2009 issued a press statement that the deceased collapsed and died after drinking a cup of water. The plaintiff disputed the truth of the first defendant's press statement and alleged that there has been a cover up of the real cause of the deceased's death to exculpate the police force from any responsibility of liability which may arise from the death of the deceased in police custody.
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[11] One Prof Dr Abdul Karim bin Hj Tajudin conducted an autopsy (first autopsy) at the Serdang Hospital and the report stated that there were “22 categories of external wounds” and the cause of death was stated as “pulmonary edema” which is related to “an abnormal build-up of fluid in the air sacs of the lungs, which leads to shortness of breath”.

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[12] With that first autopsy report, the first defendant issued a press statement that the deceased had died from “water in the lungs”. It is undisputed that the author of the first autopsy report was subsequently found guilty of professional misconduct by the Malaysian Medical Council in the preparation of the first autopsy report and was reprimanded. The implication is simply that the contents of the first report turned out to be improper and unreliable.

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[13] A second autopsy report was commissioned by the family of the deceased for the simple and glaring reason that the first autopsy report just did not reflect the multiple external signs of abuse on the body of the deceased. That second autopsy report by one Dr Prashant N Samberkar from the University Malaya Medical Centre stated that there were “45 categories of external injuries” on the body of the deceased and a wide range of internal injuries. It also stated that the cause of death of the deceased was “acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles”. Rhabdomyolysis is a serious syndrome due to a direct or indirect muscle injury.

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[14] Those muscle injuries were found to have been committed by the second defendant with his assault on the deceased. The action of the second defendant resulted in him being charged under the Penal Code for causing grievous hurt to the deceased in the Sessions Court. He was after a full trial found guilty of the charges and convicted and sentenced to three years’ imprisonment.

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[15] Arising from the above factual matrix, the plaintiff launched this suit claiming damages in the form of aggravated, exemplary, vindictory and special and premised it on the tort of negligence, breach of statutory duties for unlawfully causing the death of the deceased, misfeasance of the public office, assault and battery and false imprisonment. All the defendants, however, denied the plaintiff’s claim despite the conviction of the second defendant.

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A [16] In view of the concession by the learned SFC and learned counsel for the second defendant in this appeal, we are thus only concerned with the following:

(i) False imprisonment – RM100,000;

B (ii) Public misfeasance – RM50,000; and

(iii) Exemplary damages – RM300,000.

### **Our Grounds Of Decision**

C *False Imprisonment*

[17] The learned judge's reasoning on this issue are these:

D [27] The deceased was detained for investigation in respect of theft of a motorcar pursuant to a lawful remand warrant granted by the Magistrate of the Magistrate's Court, Petaling Jaya under s. 117 of the Criminal Procedure Code. However, the remand warrant was abused where the deceased who was taken in police custody pursuant to the lawful remand warrant was beaten and assaulted by police officers or policemen who had access to the

E deceased during the intensive interrogation and the grievous injuries must have been deliberately inflicted on the deceased as shown by the post mortem report. Consequently, the detention must be unlawful and necessarily result in false imprisonment as the purpose of the remand warrant had been abused to such an

F extent that grievous injuries were inflicted on the deceased by the policemen while the deceased was in police custody which had resulted in the deceased's death. It is important to stress that the plaintiff is not questioning the validity of the remand warrant which at the time had been obtained lawfully but the challenge is on the

G subsequent events when the tortious act were committed and grievous injuries were inflicted on the deceased under the pretext of using the lawful remand warrant and which had resulted in the death of the deceased. If the lawful remand warrant is subjected to abuse and the abuse was to such an extent that there is an

H element of criminal and tortious acts having been committed during the period of his detention as it happened in the present case, which had resulted in the deceased's death, then the detention, as contended on the plaintiff's behalf would become unlawful. Accordingly, the detention would result in false imprisonment and the plaintiff is entitled to damages when death occurs in police custody as it has, as a matter of fact in the present case.

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[18] Learned counsel for the plaintiff in his submission refers the court to the case of *Rajeshkanna Marimuthu v. Abd Wahab Hj Kassim* [2003] 1 LNS 581 where the High Court there dealt with a *habeas corpus* application premised on the ground that the conditions of the applicant's detention infringed the Federal Constitution. The learned judge, though did not grant the *habeas corpus* application, opined as follows:

The Federal Constitution, in art. 5, refers to a person being unlawfully detained whereas s. 365 of the CPC refers to a person being illegally or improperly detained. The term unlawful is, in my view, wide enough to cover both illegal and improper. Thus, whilst a detention may be legal it could become an improper detention if some material fundamental term and condition or regulation or rule governing the detention is breached or violated thereby leading to an abuse of the detention ...

In my view there are two distinct and separate parts to every prisoner's detention ie, the order by a court to detain and then the physical detention itself in an authorized place. I am of the humble view that a lawful detention that commences as a perfectly legal detention can become unlawful if the lawful detention is carried out improperly. Thus, if the lawful detention is carried out in breach of any fundamental rules or regulations pertaining to condition of detention then the detention itself becomes unlawful and improper and may attract the interference of the High Court on an application for a writ of *habeas corpus*.

[19] Learned counsel for the plaintiff urges this court to adopt the opinion of the learned judge in *Rajeshkanna Marimuthu (supra)*.

[20] Attractive as that submission may be, we are unable to agree and we adopt the rationale of this court in the case of *Ketua Polis Daerah Johor Bahru, Johor & Ors v. Ngui Tek Choi* [2013] 4 CLJ 47 where in dealing with a similar situation there held as follows:

Since the issue of a remand order under s. 117 of the CPC was an exercise of a Magistrate's criminal jurisdiction, the relevant High Court which has the jurisdiction to set aside the order is a High Court exercising its criminal, appellate or revision power under the CPC and the Courts of Judicature Act 1964. In the present appeal, the plaintiff neither pleaded the unlawfulness of the remand order nor challenged the remand order by way of an appeal or revision under the relevant provisions of the CPC. In the circumstances, the remand order remained a lawful order unless and until it is set aside by a High Court exercising its

- A criminal appellate or revision power. It was not the function of the learned JC in the instant case, in determining a civil claim for unlawful detention, to go behind the remand order and to question its legality or the manner in which it was obtained.
- B [21] The deceased's remand is a consequence of a judicial act, being an order given by a Magistrate on 15 January 2009. Unless and until this remand is set aside by way of a criminal appeal or revision by the High Court, that remand remains lawful. It is undisputed that no such application to the High Court had been made by the plaintiff to declare that the remand is unlawful.
- C Though it is pleaded by the plaintiff in the pleadings that the detention had become unlawful on grounds stated earlier, it does not help the plaintiff as we are of the view a separate suit by way of criminal revision should have been commenced and not through this civil suit.
- D [22] It is our respective view the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment. The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here the person who caused the detention is a Magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful.
- E
- F [23] In *Regina v. Deputy Government of Parkhurst Prison, Ex-Parte Hague* [1992] 1 AC 58 where a similar false imprisonment claim was made premised on the allegation that conditions of detention had become intolerable, the House of Lords held, *inter alia* as follows:
- G That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in
- H negligence rather than in false imprisonment.
- I Their Lordships also held that there must be a clear distinction between the 'nature of detention' and that of 'conditions of detention'. The nature of detention is a result of a judicial act and remains valid until set aside. The conditions of detention do not relate to 'nature of detention' and if such conditions become intolerable or illegal, they give rise not to the tort of unlawful detention.

[24] In the case of *Minister of Home Affairs v. Chu Choon Yong & Anor* [1977] 1 LNS 71; [1977] 2 MLJ 20, the Federal Court cited with approval a passage from *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 1 LNS 5; [1976] 2 MLJ 156 which reads as follows:

... When a person complains that he is being illegally or improperly detained, it is for the detaining authority to justify the detention. If the person who signed that order had power to do so and had before, when and after signing that order, complied with all conditions laid down by the law, then the order of detention which is authentic and made in good faith is sufficient answer, the court must hold the order and detention lawful – unless the detainee alleges and can prove *mala fides*.

[25] Accordingly we find that the tort of false imprisonment is not available to the plaintiff as there was in place a valid remand. What is available to the plaintiff to claim is the tort of trespass which encompasses assault and battery and negligence. The plaintiff in fact had claimed for pain and suffering from the assault and battery during the detention and arising from the same was awarded damages which we have said earlier are not appealed against by the defendants.

#### *Public Misfeasance*

[26] Under this head of claim and after perusing the submissions from respective counsel, we are of the considered view that there are two determinative issues, one of law and one of fact and they are these:

1. Whether the plaintiff's claim of public misfeasance is sustainable in light of ss. 7 and 8 of the Civil Law Act?
2. Whether the learned judge's finding of public misfeasance is correct?

#### **Issue 1**

*Whether The Plaintiff's Claim Of Public Misfeasance Is Sustainable In Light Of ss. 7 And 8 Of The Civil Law Act?*

[27] It is the contention of the learned SFC that the claim of misfeasance cannot be sustained by the plaintiff and his reasoning is evident in his submission which for ease of reference is reproduced herein and reads as follows:

**A**     It is further submitted that the cause of action in the tort of misfeasance of the public office is not claimable under s. 7 and s. 8 of the Civil Law Act 1956. This can be seen clearly from the provisions below:

**B**     The entitlement under s. 7 of Civil Law Act 1956 is prescribed as follows:

- (a) Loss of support (sub-s. (7(3) of CLA);
- (b) Funeral expenses (proviso (ii) sub-s. (7(3) of CLA);  
and
- C**     (c) Bereavement (proviso (3A) sub-s. (7(3) of CLA).

Whereas under s. 8 of Civil Law Act 1956 provides as follows:

- D**     (a) Pain and suffering if in the case of non-instantaneous death;
- (b) Funeral expenses; and
- (c) Loss of income.

**E**     It is our contention that the statutory requirements under ss. 7 and 8 of the Civil Law Act 1956 are mandatory and must be strictly observed by this Honourable Court.

**F**     We humbly submit that the plaintiff's claims are under ss. 7 and 8 of Civil Law Act 1956 which concern on the dependency and estate claim arise from the death of the deceased during the detention of the police. But now they are claiming for the act done ie, press statements which were published after the death of Kugan which clearly was not occurred during the detention of the deceased.

**G**     It must be borne in mind that nothing in the ss. 7 and 8 of the Civil Law Act 1956 suggest that the plaintiff (plaintiff) could claim for tort of misfeasance of the public office under these provisions. Thus it is clearly out of scope of what actually the plaintiff (plaintiff) is entitled to claim for.

**H**     The tort of misfeasance of the public office sought is not provided under the law. That being the case, we do not see the relevance of ss. 7 and 8 of the Civil Law Act 1956 and how these sections can be invoked to sustain this claim.

**I**

The finding of the Learned High Court Judge that misfeasance of the public office can be claimed under ss. 7 and 8 of Civil Law Act 1956 based on the decision of *Abd Malek bin Husin v. Borhan bin Hj Daud & Ors* [2008] 1 MLJ 386 that the Court of Appeal only reversed the decision on liability and did not do so on quantum, therefore ss. 7 and 8 of Civil Law Act 1956 cannot be invoked to prevent the plaintiff to claim damages in respect of the misfeasance of the public office in this case.

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In fact the case of *Malek Husin* was reversed by the Court of Appeal therefore the finding on the quantum of damages also cannot be relied anymore.

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(Refer to the Grounds of Judgement at p. 130 at para. 28 and p. 131 of para. 1 to 14 of jilid 1 bahagian A, rekod rayuan]

The principles of misfeasance of public office are derived from the common law principle whereas our provisions of law do not authorize such rights to be given.

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[28] The rationale behind the existence of ss. 7 and 8 of the Civil Law Act is clearly set out by Salleh Abbas FJ (as he then was) in *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299; [1982] 1 MLJ 269 as follows:

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At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough CJ in *Baker v. Bolton* [1808] 1 Camp 493 ruled that "in a civil court the death of a human being could not be complained of as an injury". The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: "*actio personalis moritur cum persona*". The first principle which regarded death as not giving rise to any cause of action was rectified by s. 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act 1934. The provisions of these two UK statutes are now incorporated in ss. 7 and 8 of our Civil Law Act 1956. Had it not been for ss. 7 and 8 of the Civil Law Act it is clear that the plaintiff could not have the right to bring the suit, and having acted under these sections and in particular s. 7, his case must stand and fall on the basis of these sections.

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- A [29] Sections 7 and 8 of the Civil Law Act thus give rise to two respective causes of action. Section 7 relates to what is known as “the dependency claim” where the statutorily recognised dependants of the deceased can launch a claim for the loss of pecuniary benefits which would have been provided by the deceased for the support of his dependants had he not died.
- B Section 8 relates to what is known as “the estate claim” where all causes of action, save and except what are prohibited therein, vested in the deceased prior to his death shall be survived by his personal representatives of the estate. Whatever is claimed will be
- C for the benefit of the estate.

[30] The claim of public misfeasance is a tortious claim. It is a public law tort in that it can only be committed by public officers exercising their powers wrongly resulting in injury to the claimant.

D The rationale behind this tort was aptly put by Lord Bingham in *Watkins v. Home Secretary* [2006] 2 AC 395:

- E        There is great force in the plaintiff’s submission that is where a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

- F [31] As the deceased was the victim of the alleged wrongdoings of the first, second and third defendants who are public officers, any tortious claim by the estate in our considered view comes under s. 8 pursuant to the words “all causes of action subsisting against or vested in him shall survive against, or, as the case may be”. Section 7, being a dependency claim, does not have any
- G application to a claim of public misfeasance by the plaintiff. The right to sue by the plaintiff emanates from s. 8. Hence we find the contention of the learned SFC to be misconceived.

- H [32] Learned counsel for the plaintiff in his latest ‘respondent’s further submission’ withdrew his earlier submission and now submits that the tort of misfeasance in public office was pleaded as ‘a separate and independent cause of action’ apart from those causes of action pleaded pursuant to ss. 7 and 8 of the Civil Law Act 1956. If what learned counsel means that this claim of
- I misfeasance is launched independent of ss. 7 and 8 of the Civil Law Act, we cannot see how that is possible as the former Lord

President in *Sambu Pernas Construction (supra)* held that in common law whatever rights a person has during his life are buried with him so to speak when he dies and it is only through statutory intervention that his rights are revived. In this country, it is done through the Civil Law Act 1956. In any event if one looks at the pleadings as pleaded they do not reflect what is being submitted by learned counsel. With that we now move to the factual findings by the learned judge.

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*Whether The Learned Judge's Finding Of Public Misfeasance Is Correct?*

[33] To sustain a claim of public misfeasance, what the plaintiff is required to prove is as set out in the case of *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220 which are as follows:

C

(i) The act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power;

D

(ii) The act committed must be done with malice which Lord Steyn in *Three Rivers* explained as follows:

First there is the case of targeted malice by a public officer, ie, conduct specially intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is unlawful;

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(iii) That there is proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and

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(iv) That the acts of the defendants had caused material damage to the deceased.

[34] In the plaintiff's statement of claim at para. 29, the plea of public misfeasance is stated as follows:

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29. The plaintiff further contended that the first defendant to the fourth defendant are liable for misfeasance in public office and is relying on the reasons given in the above paragraphs below:

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**A** Particulars:

(i) The defendants have repeatedly and continuously have attempted to conceal the reasons for Kugan a/l Anathan's death and the persons responsible for his death;

**B**

(ii) The defendants refuse to give access or inform the plaintiff on the location of the death after the deceased was arrested;

**C**

(iii) The circumstances and actions that led to the death of the deceased are stated in the above paragraphs. (translated in English)

**D**

[35] From the submission of the learned SFC, it can be said that his main complaint against the learned judge is that of his finding that the plaintiff had proved the malicious mental element required for a tort of misfeasance on the part of the first and third defendants when the evidence in court, as contended by the learned SFC, show that there was no attempt to cover up any of the circumstances leading to the death of the deceased.

**E**

[36] The learned SFC relied on the fact that the second defendant had been charged under s. 330 of the Penal Code and was found guilty and the other officers who were involved were transferred to desk jobs. Further it was submitted that the first defendant in making the press statements was relying on information received from another police officer (OCPD) and thus lacked malice.

**F**

[37] The learned judge after evaluating the evidence before him rejected the submission of the SFC and this is what he said:

**G**

On the claim of tort of misfeasance, this court finds, there is sufficient evidence to find the tort of misfeasance against the D1 and D3 on the following grounds:

**H**

(a) First, there is evidence that D1 had never at any time clarified or corrected his previous statement as to the cause of death of the deceased to the media on 20 January 2009 and 21 January 2009 as contained in The Star and Malaysiakini;

**I**

(b) Secondly, the tortious act was committed by D2 and/ possibly by other officers who had access to the deceased on 15 January 2009 till the deceased's death on 20 January 2009. D1 and D3 could not plead

- ignorance and disclaim knowledge as to the grievous injuries that have been inflicted on the deceased during the period of his detention and this inaction tantamount to abdicating their public duty and attempting to protect the officers and the policemen who had committed tortious act on 15 January 2009 until the deceased's death on 20 January 2009 where no departmental enquiry was held or any inquest to inquire into the death of the deceased. (Rule 3 of the Lockup Rules 1953);
- (c) Thirdly, there has been no disciplinary action taken against officers who had made and abetted entries in the station diary every four hours of their rotation duty between 15 January 2009 till 16 January 2009 and between 16 January 2009 and 20 January 2009. The entries which have been found to be false it must have been made with the knowledge or instructions of the superior officers in charge of the Taipan Police Station;
- (d) Fourthly, the entries in the station diary by the officers during rotation of their duty every four hours have been found to be inconsistent and flies on the face of the grievous injuries found in both the post mortem reports;
- (e) Fifthly, there are compelling reasons and inference to be drawn that the tortious act committed on the deceased, be it by D2 or other officers responsible was condoned by the officers in charge of the police station and could not have been so openly and boldly written the false entries without the knowledge of the officers. The entries must have been made with the knowledge of Sub Inspector Loh Voon Chye ('DW3'), D3 and ASP Radhuan and other officers or policemen who had made the entries between 15 January 2009 until the deceased's death on 20 January 2009;
- (f) Sixthly, there is clear admission by DW6 that although he claimed to have witnessed the assault and battery committed by D2 on the deceased on 16 January 2009 after hearing the deceased's scream, he did not enter the incident of assault and battery by D2 in the station diary. In fact he had still continued to write that the deceased was 'dalam keadaan baik';

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- A            (g) The grievous injuries found on the deceased as contained in both the post mortem reports, particularly, the second post mortem report could not have been inflicted as a result of the assault and battery by D2 alone on 16 January 2009 but it must have occurred over the period of his detention by a series of assault and battery, be it by D2 and or the other officers who had access to the deceased;
- B
- C            (h) The particulars of the charge expressly states that the serious injuries which was inflicted on the deceased was to obtain confession which confession was for the benefit of the defendants to implicate the deceased with the offence for which he was suspected to have committed;
- D            (i) Admittedly, there is a breach of the Lockup Rules 1953, as the Taipan Police Station did not have lockup or a gazzetted lockup;
- E            (j) The remand warrant which was obtained from the magistrate for the purposes of investigation has been subjected to abuse of power and with intent to harm the deceased involving malice, knowledge and intention and had caused grievous bodily injuries on the deceased which had caused his death; and
- F            (k) There has been unlawful act in the exercise of power of public officer as an abuse of power and the injuries were inflicted in bad faith, the tortious act had caused the death of the deceased.

G            [38] Before we analyse the findings of the learned judge we remind ourselves of the principle of non-interference of an appellate court when it concerns findings of facts by the trial judge. We can do no better than refer to the case *Azman Mahmood & Anor v. Sŕ Securities Sdn Bhd* [2012] 6 CLJ 573; [2012] MLJU 660 where the Federal Court restated the principles as follows:

H            The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Mutar Masngud v. Lim Kim Chet and Anor* [1982] CLJ 107 FC; [1982] 1 MLJ 184 FC, wherein it was held that an Appellate Court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In the Privy Council

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case of *Choo Kok Beng v. Choo Kok Hoe and Ors* [1984] 2 MLJ 165 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analyzed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice.

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[39] Across the causeway we have the decision of the Singapore Court of Appeal in *Thorben Langvad Linneberg v. Leong Mei Kuan* [2012] SGCA 61 where the court held as follows:

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The appellate court's power of review with respect to finding of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned. However, the court may intervene if it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate court can and should overturn any such finding.

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[40] The task before us now is simply to determine whether the findings of the learned judge are perverse in that they were not based on established evidence. Put in another way, whether the findings of the learned judge are findings which no reasonable tribunal could arrive at. And if we find the answers to be in the affirmative, we are duty bound to intervene.

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[41] We start our deliberation with the undisputed evidence that there has been a custodial death of the deceased in circumstance in which the second defendant was directly involved while the first defendant at the material time was the Deputy Commissioner of Police and the Chief Police Officer of Selangor and the third defendant was then the Assistant Commissioner of Police and Officer in Charge of Police District (OCPD) Subang Jaya, Selangor.

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[42] At this juncture we note here that this is a civil suit in which the burden is on the plaintiff to prove her case on a balance of probabilities. And if at any stage of the proceeding, the evidence is that it amounts to a *prima facie* case, the evidential burden shifts to the defendants to rebut. That said we now consider the evidence.

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A    [43] We start with the warrant of remand in which the  
Magistrate had ordered that the deceased be remanded at the  
Petaling Jaya police station lockup but for some unknown reason  
the deceased was remanded at Taipan police station which is not  
B    a gazetted lockup. It is undisputed that the whereabouts of the  
deceased were not made known to the deceased's family until his  
untimely death despite requests from the family. That in our view  
had denied the deceased's ability to seek legal advice which gives  
rise to a breach of the deceased's constitutional right of access to  
legal representation as provided by arts. 5(1) and (3) of the  
C    Federal Constitution which read as follows:

5. Liberty of the person

(1) No person shall be deprived of his life or personal liberty  
save in accordance with law.

D

(2) ...

(3) Where a person is arrested he shall be informed as soon as  
may be of the grounds of his arrest and **shall be allowed to  
consult and be defended by a legal practitioner of his  
choice.** (emphasis added)

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As set out earlier in our judgment, learned SFC had submitted  
that the learned judge had erred when he did not accept the  
explanation of the first defendant that there was no cover up.  
F    That explanation is that his statement that the deceased collapsed  
after drinking water was informed to him by the third defendant,  
that his refusal to make any press statement is premised on the  
first autopsy report, and when the second autopsy report was  
made known an investigation was conducted resulting the second  
G    defendant being charged in court and other officers being assigned  
to desk work. Hence the learned SFC submits that there was no  
malice on the part of the first defendant.

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[44] The information of the third defendant as the OCPD given  
to the first defendant, in our considered view, is with respect  
H    either wholly reckless or purely and simply untrue. We say that for  
the simple reason that from the second autopsy report, there were  
apparently some 45 external injuries on the body of the deceased,  
meaning simply that they are visible to the naked eye. Those  
apparent injuries surely raise the question as to whether the third  
I    defendant had made any serious enquiry as to how the deceased

succumbed to his death or there was as the learned judge found an attempt to cover up as to what really happened during the seven days detention. A

[45] Even when the first autopsy report was made known on 21 January 2009, there is also no evidence that the first defendant or third defendant had asked the author of that report the obvious question of whether the cause of death is consistent with the apparent and numerous injuries of the deceased. Surely that is the least the first and third defendant should have done. It cannot be that the law requires no inquiries from the first and third defendant when an autopsy report appears to be inconsistent to the external injuries of the deceased. Further, to state the obvious, there has been a custodial death and that should have rung “alarm bells from the word go” so to speak. Fortunately with the insistence of the deceased’s family and legal adviser, a second autopsy was conducted. That second autopsy report in fact confirms what was stated in the first autopsy report to be unreliable to say the least. B C D

[46] With the release of the second autopsy report, the first defendant instead of calling for an independent inquiry to find out what had happened during the seven days detention conducted an internal investigation. The learned judge’s view on the need to call for an independent inquiry is this: E

Departmental enquiry or an inquest was necessary so as to ensure that all relevant facts are ‘fully, fairly and fearlessly’ investigated and all the relevant facts discovered are exposed to public scrutiny. F

Failure on the part of the superior police officers in the present case, be it, D1 and D3 to recommend departmental enquiry or an inquest is not open to rationality in terms of responsibility and public duty. A Coroner’s inquest is conducted in a transparent fashion to ascertain and ensure that the controversial death, as in the present case, were independently and fully investigated in a public forum and it would be a flexible process. G

In a cases of a custodial death and where the deceased is found to have died as a result of the injuries inflicted on him voluntarily and as a deliberate act, it calls for a full departmental enquiry or at the very least an inquest provided under the Criminal Procedure Code and nothing less or short of that will eliminate the distrust and confidence in the police officers that ‘something H I

A was rotten' at Taipan Police Station between 15 January 2009 until the time of the deceased's death on 20 January 2009 and to assert and testify in court that there was no cover up is another attempt to ask this court to cover up the evidence in court which has to be rejected outright as it is against the weight of the evidence.

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[47] Learned SFC submits that the learned judge's view of the need for an independent inquiry was erroneous as there is no written law requiring that such inquiry be held for custodial deaths. With respect, we are unable to agree. The police force is  
C a public professional body and as in other professional bodies there exist duties of care in their discharge of their powers. In the context of the police force, it is their standard operating procedure (SOP) and that should be subject to scrutiny by the court of law. As to what that duty of care and standard of care are depend on  
D the circumstances of each individual case and it is for the courts to determine what that duty and standard of care are as was done in the Federal Court case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593.

E [48] In *Foo Fio Na* case, the Federal Court quoted with approval Callaghan J in *Hajgato v. London Health Association* [1982] 36 OR (2d) 669, where in an action in negligence in respect of personal injuries sustained during post-operative case the learned judge stated as follows:

F In my view however, a court has a right to strike down substandard approved practices when **common sense dictates such a result**. No profession is above the law and the courts on behalf of the public have a critical role to play in monitoring and precipitating changes where required in professional standards.  
G (emphasis added)

[49] The Federal Court itself after reviewing all the relevant authorities pronounced as follows:

H [77] In the Irish case of *Best v. Wellcome Foundation Ltd* [1994] 5 Med LR 81, Finlay CJ expressed the same concern and defined the "function which a court can and must perform in the trial of a case in order to acquire a just result, is to **apply common sense** and a careful understanding of the logical and likelihood of events to conflicting opinions and  
I conflicting theories concerning a matter of this kind". (emphasis added)

[78] Therefore there is a need for members of the medical profession to stand up to the wrong doings, if any, as in the case of professionals in other professions. In so doing people involved in medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in their deliberations. On this basis we are of the view that the *Rogers v. Whitaker* test would be a more appropriate and a viable test of this millennium than the *Bolam* test. To borrow a quote from Lord Woolfe's inaugural lecture in the new Provost Series, delivered in London in 2001, the phrase **"Doctor knows best" should now be followed by the qualifying words "if he acts reasonably and logically and gets his facts right"**. (emphasis added)

[50] The learned judge's view is consistent with art. 2 of the European Convention on Human Rights which states as follows:

45. Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a. In defence of any person from unlawful violence;
  - b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c. In action lawfully taken for the purpose of quelling a riot or insurrection.

[51] Lord Bingham of Cornhill in *R (on the application of Middleton) v. West Somerset Coroner* [2004] UKHL 10 has interpreted art. 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any custodial death. We see no reason why we should not adopt a similar duty to initiate such public investigation when circumstances such as we have in this case leading to a custodial death warrant it. Let us not be unmindful of the fact that in this country we do not have an ombudsman to look into any public complaint.

- A** [52] In view of what we have stated above, we agree with the learned judge that in the circumstances of this case, an independent inquiry should have been initiated and nothing short of that would have sufficed. The learned judge in his grounds had listed many unanswered questions and common sense in our view
- B** demands that only a full public inquiry would answer those questions.

- C** [53] We are also rather perturbed by the admission of the first defendant that he had negotiated with the Attorney-General that the investigation is to be confined to an offence under s. 330 of the Penal Code. (Refer to notes of proceedings at p. 116, also at p. 1528 rekod rayuan tambahan jilid 2(7) bahagian B). This with respect is an affront to the concept of fair play and transparency. What appears to have happened was that the police had become
- D** the judge and jury of a complaint made against their behaviour. This conduct with respect misses the point completely and that is the police force at that point in time was “on trial” and to allow the police to determine what ought to be done was simply asking the wrongdoers to do their own investigations and determine the
- E** appropriate actions. Common sense militates against such a course of action.

- F** [54] We must also not forget that where there is a custodial death, the family of the deceased is entitled to know the truth as to what had happened during the detention. That is their intrinsic right to know. This entitlement to know can be easily understood by just asking the simple question – what if it is your 22 year old son who had died in custody.

- G** [55] The un rebutted allegation of the second defendant that he was made the ‘fall guy’ in this unfortunate affair raises more questions than answers. Further even though the author of the first autopsy report was reprimanded by his professional body, there is no definite answer as to why he had prepared it in the manner as he did. A full public and independent inquiry may give
- H** some insight into this.

- I** [56] We are also perturbed by the fact that no inquest was held as permitted by s. 334 of the Criminal Procedure Code when the second autopsy by itself should have warranted a full investigation of the circumstances in which the deceased met his death.

[57] We are also in agreement with the learned judge's views on the incorrect entries in the lockup diaries which show that "OKT dalam keadaan baik" and these entries were purely and simply untrue as confirmed by the evidence of DW6. Reading the testimonies of the witnesses of the defence, we cannot but have the impression that they were unwilling to 'spill the beans' so to speak on their fellow officers.

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[58] From what we have stated above, we find that the learned judge's findings were based on established evidence and are far from perverse. Common sense and common decency demand that a full public inquiry be initiated which would have served both the private and public interests in a manner demanded in a civil society. That said we find that the use of the phrase 'cover up' by the learned judge to be inappropriate as it implies a criminal intent where in this case we find none on the part of the first and third defendants. We find however that the judge's findings do lead to the irrefutable conclusion that the first and second and third defendants had breached their duty of care to the deceased.

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[59] In summary, we say that this wilful disregard to ensure that the truth behind the death of the deceased is made known together with other undisputed evidence set out above are enough to satisfy a case of public misfeasance. It is also our view that there has been a reckless indifference to the illegal act of the second defendant. We further find that the evidence proffered by the defendants had not rebutted the evidence set out above by us and that of the learned judge. In other words, the conduct of the defendants fell far short of the SOP which we say must require more disclosure than what had happened in this case.

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[60] Lord Steyn in *Three Rivers DC v. Bank of England (No 3)* [2003] 2 AC 1 opined at p. 192 that to impose liability where the defendant had acted with reckless indifference to the illegality of his act and the probability of its causing injury, was "an organic development, which fits into structure of our law governing intentional torts". We adopt His Lordship's view without any reservation.

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[61] Learned SFC has tried to distinguish the Canadian case of *Odhavji Estate v. Woodhouse* [2003] 3 SCR 263 on the ground that that case relates to a breach of some statutory duty. In that case, there was an application to strike out a public misfeasance suit

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A premised also on a custodial death resulting from assault and battery. The Canadian Supreme Court dismissed that application to strike out as there is a *prima facie* case of public misfeasance where there has been a breach of a statutory duty. With respect  
B of a breach of tortious duty of care as set out above. We see no good reason to give that difference any value when as in here there has been a custodial death resulting from assault and battery.

C *Exemplary Damages In The Context Of ss. 7 And 8 Of The Civil Law Act*

[62] On this issue, the contention of the defendants is premised on s. 8(2) Civil Law Act which reads as follows:

D (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:

E (a) Shall not include any exemplary damages, any damages for bereavement made under sub-s. 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death.

F [63] The learned judge dealt with the defendants' contention in the following manner:

G [93] With due respect to the learned Senior Federal Counsel whatever force there may or may not be in his submissions and his reservation on the award of exemplary damages, in particular, relying on s. 8 of the Civil Law Act 1956 has to be considered on a case by case. The court's discretion should not be limited to s. 8 of the Civil Law Act 1956 as this court must be able to apply common law on the factual matrix in the present case to award exemplary damages. As stated above, exemplary damages, are given in cases of  
H 'conscious wrongdoing in contumelious disregard of another's rights' which has been described as vindictive, retributory, punitive (*Whitfield v. De Lauret* [1920] 29 CLR 71 at p. 77) and the present case is one which fits well in that category.

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[105] Therefore, from the close reading of the conclusion of the Court of Appeal in *Borhan Hj Daud & Ors v. Abd Malek Hussin* [2010] 8 CLJ 656 (Civil Appeal No. W-01-122-2007), the Court of Appeal did not agree with the reasoning of the High Court, with respect, in respect of liability but nothing was said on the findings of the awards of damages which included exemplary damages or that the High Court has no power to award exemplary damages or damages for false imprisonment. The contention of learned Senior Federal Counsel that the Court of Appeal has set aside the award of exemplary damages or damages of false imprisonment in accordance with his submissions that this court has no power to award exemplary damages cannot be sustained and is a misreading of the judgment, and is misplaced. There is nothing in the grounds of judgment of the Court of Appeal to state directly or impliedly that the court cannot award exemplary damages or damages for false imprisonment or misfeasance when there is claim for dependency pursuant to s. 7 or a claim under s. 8 of the Civil Law Act 1956. At first sight it may be seen as if the Court of Appeal had in fact disagreed with the reasoning of the High Court in awarding the exemplary damages but however on close reading, with respect, it does not appear to be and should not be read in that context or be read into the judgment as intended by the learned Senior Federal Counsel. There was absolutely no finding or *ratio decidendi* of the judgment in the Court of Appeal to say that the award of exemplary damages is not allowed in law. In the circumstances, this court, with respect, would follow the reasoning of the High Court on the award of exemplary damages. (*Abd Malek Hussin v. Borhan Hj Daud & Ors* [2008] 1 CLJ 264; [2008] 1 MLJ 368 at pp. 287 to 289 (CLJ); pp. 395 to 396 (MLJ)).

[64] From the above passages, it can be seen that the learned judge had applied the common law to the factual matrix as he found them and seen fit not to be bound by the provision in s. 8 (2) in awarding exemplary damages. It would not be wrong to say that the learned judge saw the injustice which the deceased had suffered and justice dictated that an award of exemplary damages is required. The learned judge also relied on the judgment of *Borhan's* case (*supra*) to support his view.

[65] Exemplary damages are damages awarded for cases when the courts find the actions of the wrongdoers to be reprehensible and a conscious complete disregard of another's rights. It is not compensatory in nature but intends to reform or deter the

- A**     defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. Lord Devlin in the often quoted case of *Rookes v. Barnard* (19643) AC 1129 puts it this way:
- B**             There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal.
- C**     **[66]** We start with our deliberation by referring to arts. 5 and 8 of the Federal Constitution which read as follows:
- Article 5
- D**             (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- Article 8
- E**             (1) All persons are equal before the law and entitled to the equal protection of the law.
- F**     **[67]** Both articles of the Federal Constitution speak for themselves and need no further explanation from us. The basic premise of these articles is universal and that is every human life is sacred and every citizen of this country, including suspects of crimes or convicted criminals, is expected to be treated with human decency during their detention and the protection of the law. In the context of this case, a person's life was deprived of or taken away not in accordance with law as commanded by the Federal Constitution but by means which did not fit any
- G**     semblance of human decency.
- H**     **[68]** In interpreting any statute, it is our considered view that the courts must always be vigilant to any interpretation which may dilute the importance of any constitutional rights of citizens of this country. The significance of any breach of any basic rights provided for in the Federal Constitution cannot be viewed in the same manner as a breach of say 'traffic law' for the simple reason that there is no greater breach than that of a breach of a constitutional right. Further in this country we practise constitutional supremacy as opposed to parliamentary supremacy.
- I**     Hence it is incumbent on the courts when interpreting any statutes, resort must be made to the Federal Constitution when appropriate to do so.

[69] Such approach found favour in the case of *Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975 HL where the House of Lords dealt with provisions similar to that of s. 8 of the Civil Law Act. For clarity the relevant English provisions are ss. 1(1) and (2) of the English Law Reform (Miscellaneous Provisions) Act 1934 read as follows:

1. Effect of death on certain causes of action

- (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate. Provided that this subsection shall not apply to causes of action for defamation.
- (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:
  - (a) Shall not include:
    - (i) Any exemplary damages;
    - (ii) Any damages for loss of income in respect of any period after that person's death.

[70] The facts in the *Ashley* case are quite similar to the case at hand in that Mr Ashley died as a result of a police raid. He was shot and killed by the police during the raid when he was naked and unarmed. The officer was charged with the murder of Mr Ashley but was acquitted in view of the absence of any evidence to disprove his contention of self-defence. The father and son of Mr Ashley as dependants brought an action pursuant to the Fatal Accidents Act 1976 and for the benefit of the estate pursuant to s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 against the relevant officers for damages for, *inter alia*, assault and battery, negligence and false imprisonment in respect of the planning and execution of the raid. The Fatal Accidents Act 1976 is similar to s. 7 of the Civil Law Act while s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 is similar to s. 8 of the Civil Law Act respectively.

[71] The same argument as advanced here by the learned SFC was dealt with by Lord Scott of Foscote in the following manner at pp. 985 and 986:

- A     The claim forms issued by the Ashleys simply seek damages for the torts giving rise to the deceased Mr Ashley's death. These torts include, of course, the assault and battery tort. The only legitimate purpose for which Fatal Accidents Act damages can be claimed and awarded for this tort is, in my opinion, compensatory.
- B     The damages are awarded for a loss of dependency. But the purposes for which damages could have been awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindictory purpose. In *Chester v. Afshar* [2005] 1 AC 134, para. 87 Lord Hope of Craighead remarked
- C     that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a hollow one, stripped of all practical force and devoid of all content". So, too, would the right. How
- D     is the deceased Mr Ashley's right not to be subjected to a violent and deadly attack to be vindicated if the claim for assault and battery, a claim that the chief constable has steadfastly and consistently disputed, is not allowed to proceed? Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in
- E     principle why an award of compensatory damages should not also fulfil a vindictory purpose. But it is difficult to see how compensatory damages can could ever fulfil a vindictory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place. In *Daniels v. Thompson* [1998] 3 NZLR 22, 70 Thomas J observed that
- F     "Compensation recognises the value attaching to the plaintiff's interest or right which is infringed, but it does not place a value on the fact the interest or right ought not to have been infringed at all". In a later case, *Dunlea v. Attorney General* [2000] 3 NZLR 136, Thomas J drew a distinction between damages which were
- G     loss-centred and damages which were rights-centred. Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all. In *Attorney General of Trinidad and Tobago v. Ramanoop* [2006] 1 AC 328 the Privy Council upheld an award of vindictory damages in respect of
- H     serious misbehaviour by a police officer towards the claimant. These were not exemplary damages; they were not awarded for any punitive purpose. They were awarded, as it was put in *Merson v. Cartwright* [2005] UKPC 38, another case in which the Privy Council upheld an award of vindictory damages, in order
- I     "to vindicate the right of the complainant ... to carry on his or her life in the Bahamas free from unjustified executive interference,

mistreatment or oppression”: para 18. The rights that had been infringed in the *Ramanoop* case and in *Merson v. Cartwright* were constitutional rights guaranteed by the respective constitutions of the countries in question. But the right to life, now guaranteed by art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and incorporated into our domestic law by the Human Rights Act 1998, is at least equivalent to the constitutional rights for infringement of which vindictory damages were awarded in *Ramanoop* and *Merson v. Cartwright*. It is, of course, the case that if self-defence can be established as an answer to the Ashleys’ claims of tortious assault and battery no question of vindictory damages will arise. But, unless the claim can be said to have no reasonable prospect of success, that is no reason why the assault and battery claim should not be permitted to proceed to a trial.

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[72] From the grounds of Their Lordships, it is quite clear that they saw no impediment in awarding exemplary damages despite the express prohibition of awarding exemplary damages in an estate claim when they consider that prohibition in the light of fact that the claim of the Ashleys was for damages stemming from a breach of a right provided for in the Human Rights Act 1998 which Act is the consequence of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His Lordship equated that statutory right to be a constitutional right by virtue of the connection or link between the Human Rights Act and European Convention for the Protection of Human Rights and Fundamental Freedoms. And such equation was done despite the fact that there is no written Constitution in England which practises Parliamentary supremacy.

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[73] As stated earlier, this country practises Constitutional Supremacy and thus any breach of any constitutional right must be jealously guarded by the courts and protected with the severity as it justly deserves. A constitution so to speak is the heart of a country and the blood vessels of the heart are the entrenched rights of every citizen of the country. Any mutilation of those blood vessels must be attended to immediately and with the appropriate measures as any failure to do so would lead to the obvious diagnosis of a weak heart.

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[74] That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where there is a breach of a

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A constitutional right by a public authority, s. 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

B [75] We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law act was enacted, it was only in respect of private tortious actions. Hence we are of the view that s. 8 of the Civil  
C Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages.

[76] There is another reason for our decision. In Malaysia, we do not have an ombudsman or an Independent Police Complaint and Misconduct Commission despite the recommendation of a Royal  
D Commission for Police Reform (2005). In the case before us, the intention of the plaintiff is clear and that is to hold the defendants responsible and accountable for their unlawful action as public officers. It is not just a case of merely being compensated, it is  
E more and that is to ensure that the public officials who are supposed to be the guardians of the Constitution are brought to task and that such unlawful actions should not happen again. Remand prisoners are innocent until convicted in a court of law and like other citizens they are entitled to their basic human rights  
F during their lawful detention. Hence we are of the view that there is no reason that the courts should not take the role of an ombudsman as is done in the Canadian jurisdiction – see *Allen M Linden* – “*Tort Law as Ombudsman*” and *McMaster v. The Queen* 2008 Federal Court 1158. That is to say the courts do so within  
G the confines of their judicial roles.

[77] As to whether exemplary damages should be awarded, we see no clearer case as in this case where it must be given to reflect the severity of the breach. The circumstances in which the deceased’s constitutional right was breached have been dealt with  
H in detail by the learned judge and affirmed by us earlier in our grounds. Any reasonable tribunal in our view would conclude that this is an appropriate case to award exemplary damages. Not to award such exemplary damages would in our mind be ‘not attending to the mutilation with the appropriate care’.

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[78] As for the quantum of the exemplary damages, there is also no reason to disturb the award granted by the learned judge as it commensurate with the actions of the defendants.

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### Liability Of The Second Defendant

[79] The main complaint of the second defendant in our view is that the learned judge failed to consider whether the role in which the second defendant played warranted making him jointly and severally liable for the damages awarded.

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[80] We see merit in the complaint as the learned judge had stated that there are other police officers involved in the circumstances which led to the death of the deceased. Despite those findings, the learned judge failed to take them into consideration in determining the liability of the second defendant.

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[81] As for the other facets of public misfeasance, it is not disputed that some of those conducts occurred post death of the deceased by which time, the second defendant could not have been responsible.

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[82] This failure of the learned judge warrants us to allow the second defendant's appeal in part only in that we also find him responsible partly for the death of the deceased. The degree of responsibility in our view should be reduced to 45% and our reasons are these. As stated earlier, the second defendant was not alone in this self-induced tragedy. By the defendants' admission, other police officers by virtue of their involvement had been assigned to desk duties as a form of punishment. Further the deeds of the first and third defendants as elaborated by us earlier had contributed considerably to the acts of public misfeasance.

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### Vicarious Liability

[83] The law is settled in this area of law and it is as stated by James Foong J (as he then was) in *Roshairree Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39:

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But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them. *Canadian Pacific Railway Co v. Lockhart* [1942] AC 591 @ 599, which adopted a passage from *Salmond*

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**A**     *on Torts*. In turn, it is accepted by our Malaysian Courts in *Keppel Bus Co. Ltd. v. Saad bin Ahmad* [1974] 1 LNS 62; [1972] 2 MLJ 121 which was affirmed by the Privy Council in [1974] 1 MLJ 191.

**B**     In other words, a master is responsible not merely for what he authorises his servants to do, but also for the way in which he does it. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside of it.

**C**

By this provision, the third defendants claim that the practice of such activities is and was unauthorised and will not be tolerated.

**D**     Though this may be so, this court has still to decide based on the entire evidence whether the acts of the first and second defendants were carried out while they were in the course of their duties, to the extent that they were so connected with their authorised duties that they may be regarded as a mode of doing them.

**E**     Though the first defendant's acts of assault were unauthorised by the third defendant, they were carried out during the normal course of duty of the first defendant.

**F**     Such being the case, his unauthorised acts have become so connected with his authorised acts that this court finds them to have become "modes – although improper modes – of doing them". For this, the third defendant must be held vicariously liable for the unlawful actions of this defendant.

**G**     [84] The learned judge in our view had relied and applied the above statement of principle to the factual matrix here correctly and hence we see no reason to disturb his findings on the vicarious liability of the fourth and fifth defendants.

### **Conclusion**

**H**     [85] This has been a difficult case for this court as we are embarking in an area where the law has not been fully developed. It is also a tragic case which could have been avoided had proper due care and adherence to the law been followed by the defendants. That said, we in our deliberations had kept at the

**I**     foremost of our minds of what Azlan Shah J (as His Highness

then was) said in the case of *PP v. Tengku Mahmood Iskander & Anor* [1973] 1 LNS 124; [1973] 1 MLJ 128. We are fully aware that what was said was in a context of a criminal case but the message it carries apply aptly to this appeal. This is what His Highness said:

Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales ie the interest of the accused person and the interest of the community, then I say justice is fair. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament. We must keep the balance true.

[86] Custodial death cannot and should not happen in this country. There should be zero tolerance to any custodial death in all the remand centres in the country. And should custodial death happen, a public independent inquiry must be initiated to commensurate with the right of the family to know of the deceased when there is some doubt as to the cause of death.

[87] In this case, the death of the deceased in custody plus the implicit admissions by the defendants had shifted the burden on to the defendants to rebut the claims of the plaintiff. From the evidence proffered in court by the defendants and then looking at the totality of the evidence, we see no reason to conclude contrarily to what the learned judge had found.

[88] Accordingly we allow the appeal in part and make the following orders:

- (i) The award of RM100,000 for false imprisonment is set aside;
- (ii) As for the rest of the awards, they are affirmed;
- (iii) The second defendant's liability is amended and reduced to the extent of 45%;
- (iv) Costs to the plaintiff in the sum of RM30,000 with the second defendant liable for RM13,500 and the rest of the defendants liable for RM16,500; and
- (v) The deposit is to be refunded.